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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

ANNA DiMATTINA, *formerly known as*
ANNA ZAMPITELLA, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION
SERVICE, *Respondent*

Petitioner, Anna Zampitella, formerly known as Anna DiMattina, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this proceeding on July 12, 1974.

OPINIONS BELOW

The order of the Court of Appeals denying Petitioner's Petition for Rehearing, dated July 12, 1974, is Appendix A. The judgment and order of the Court of Appeals, dated June 17, 1974, is Appendix B. The decision of the Board of Immigration Appeals, dated July 25, 1973, is Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1974, and a timely filed petition for rehearing was denied on July 12, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction in the Court of Appeals was under 8 U.S.C. §1105a(a).

QUESTIONS PRESENTED

1. Is 8 U.S.C. §1255(c), which excludes natives of the Western Hemisphere from adjustment of status under 8 U.S.C. 1255(a), invalid because 8 U.S.C. §1152(a) forbids discrimination against a person in the issuance of an immigrant visa because of nationality or place of birth?

2. Is Petitioner, a long time permanent resident of the United States, denied due process of law as guaranteed by the Fifth Amendment, when she is precluded by the terms of 8 U.S.C. §1255(c) from applying for relief from deportation solely because she was born in the Western Hemisphere, thus requiring her separation from home and family, when a native of the Eastern Hemisphere is eligible to apply for such relief?

3. Was the Court of Appeals in error in holding that Congress can, in legislating on immigration, deny due process of law to a long time permanent resident of the United States?

STATUTORY PROVISIONS INVOLVED

8 U.S.C. §1152(a) provides in part that:

> "No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence, except as specifically provided in sections 1101(a)(27), 1151(b), and 1153 of this title."

8 U.S.C. §1182(c) provides that:

> "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven

consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title."

8 U.S.C. §1255 provides that:

(a) "The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

(b) "Upon the approval of an application for adjustment made under subsection (a) of this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference or non-preference visas authorized to be issued under section 1153(a) of this title within the class to which the alien is chargeable, for the fiscal year then current.

(c) "The provisions of this section shall not be applicable to any alien who is a native of any country of the Western Hemisphere or of any adjacent island named in section 1101(b)(5) of this title."

8 U.S.C. §1251(a)(11) provides that an alien is deportable if he or she:

"is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate."

STATEMENT OF THE CASE

Petitioner was admitted to the United States as a permanent resident on November 20, 1960. She is twice widowed of United States citizens, she has a citizen child, and permanent resident children. On October 9, 1970, Petitioner entered a plea of guilty to the offense of "purchasing and distributing a narcotic drug not in the original stamped package," in violation of 26 U.S.C. §4704(a). She was sentenced to three years, to be served five months in jail and two years, seven months on probation and a five thousand dollar fine.

Immediately after commencement of the sentence, deportation proceedings were commenced. Petitioner was found deportable under 8 U.S.C. §1251(a)(11) and applied for relief under 8 U.S.C. §1255 and §1182(c). The immigration judge ruled that the applications could not be received since petitioner was a native of the Western Hemisphere, relying on 8 U.S.C. §1255(c) and ordered deportation.

Relief by the Board of Immigration Appeals was refused, the Board holding that it could not pass on the constitutionality of provisions of the Immigration and Nationality Act. Petitioner was foreclosed from ever raising a constitutional challenge at the deportation hearing and before the Board of Immigration Appeals.

A petition for review was filed with the United States Court of Appeals for the Third Circuit. The court refused to hear oral argument. In a summary order referring only to the constitutional argument, the petition for review was denied. A petition for rehearing was also denied.

REASONS FOR GRANTING THE WRIT

1. The decision that 8 U.S.C. §1255(c) precludes a native of the Western Hemisphere from applying for adjustment of status contravenes the guarantee of 8 U.S.C. §1152(a) which forbids such discrimination and thus presents an important issue of statutory interpretation.

Petitioner sought to apply for the relief provided by 8 U.S.C. §1182(c). This relief could only be sought by Petitioner as part of an application for adjustment of status under 8 U.S.C. §1255. *Tibke v. INS*, 335 F.2d 42 (2d Cir. 1964); *Matter of Smith*, Int. Dec. 1510, 11 I & N Dec. 325. Petitioner was precluded from applying for adjustment of status because she is a native of the Western Hemisphere, despite being a permanent resident of the United States.

Distinct from the matter of the fundamental guarantee which is abolished with dire consequences, the issue of statutory interpretation is important. The anti-discrimination provision of §1152(a), in the nature of a remedial statute, is to be liberally construed. *Peyton v. Rowe*, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed. 2d 426 (1968); *Tcherepnin v. Knight*, 389 U.S. 332, 88 S.Ct. 548, 19 L.Ed. 2d 564 (1967). Further, this Statute should be construed to avoid unnecessary hardship. *Burnett v. Guggenheim*, 288 U.S. 280, 53 S.Ct. 369, 77 L. Ed. 748 (1953). Despite these established principles, the lower court, by its total silence on the issue, gave the discriminatory provision precedence over the ameliorative provision. The importance of this question of statutory interpretation is enhanced as it is one of first impression in this Court. *American Federation of Musicians v. Wittstein*, 379 U.S. 171, 85 S.Ct. 300, 13 L.Ed. 2d 214 (1964).

It is further enhanced because respondent has denied Petitioner the opportunity to apply despite the unequivocal proscription of 8 U.S.C. §1152(a) against discrimination in the issuance of an immigrant visa based on nationality or place of birth. This guarantee is manifestly basic and

fundamental and its abrogation in this context has a devastating effect on Petitioner and others in similar posture. It is not just the loss of a statutory benefit; it is the eradication of a guarantee against discrimination predicated upon an accident of birth resulting in loss of opportunity to even apply for relief, the absence of which can wrench long time permanent residents from home and family, when a person similarly situated but born elsewhere could apply. A significant question of statutory interpretation is thus presented.

2. The holding of the Court of Appeals that a long time permanent resident of the United States is not entitled to be free from unconstitutional discrimination in the application of the Immigration laws is erroneous, conflicts with opinions of this Court, and deprives a significant number of residents of the United States of the fundamental right of Due Process of Law guaranteed by the Fifth Amendment.

The decision below is in direct conflict with *Kwong Hai Chew v. Colding*, 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576 (1953), which recognized the vested situation of a permanent resident. In distinguishing *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 317 (1950), this Court stated that "it is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment." In failing to distinguish a permanent resident alien from any other alien, the lower court was in direct conflict with the Court, thus subjecting Petitioner and others in like posture to unconstitutional discrimination. *Kwong Hai Chew v. Colding, supra; Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed. 2d 853 (1973); *In Re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed. 2d 910 (1973).

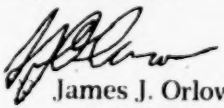
The discrimination established by 8 U.S.C. §1255(c) against natives of the Western Hemisphere is invidious and without basis as applied in this case. As whatever

policy reasons support 8 U.S.C. §1255(c), there are none relevant in the case of a permanent resident. The provision was enacted to protect against what had been a situation of individuals from countries in the Western Hemisphere coming to the United States on non-immigrant visas and seeking to adjust status while in the United States. See House of Representatives Report No. 745, 89th Congress, 1st Session, p. 22 (Section 13). As Petitioner is not in the group legislated against, but rather is a long time permanent resident seeking to apply for adjustment of status as relief from deportation, the discrimination is invidious and there is no rational relationship between the statutory provision and a legitimate purpose in this case. *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed. 2d 768 (1973), and the result is foreclosure of ability to apply for a remedy Petitioner could apply for if born elsewhere, with the lack of remedy requiring deportation and forced separation from citizen relatives and others.

CONCLUSION

For these reasons, the Writ of Certiorari should issue to review the judgment and opinion in the United States Court of Appeals for the Third Circuit in the instant proceedings.

Respectfully submitted,



James J. Orlow
WASSERMAN, ORLOW, KAYE, AND RUBIN
Suite 824
1315 Walnut Street
Philadelphia, Pa. 19107
Counsel for Petitioner

Of Counsel:
Richard D. Steel, Esquire

August 16, 1974

Appendix

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 73-2016

ANNA DiMATTINA, *formerly known as* ANNA ZAMPITELLA, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent*

Present: STALEY, GIBBONS and WEIS, *Circuit Judges*

ORDER

Petitioner's Petition for Rehearing before the original panel is hereby denied.

By the Court,

John J. Gibbons
Circuit Judge

Dated: July 12, 1974.

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 73-2016

ANNA DiMATTINA, *formerly known as*
ANNA ZAMPITELLA, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

Submitted Under Third Circuit Rule 12(6)
June 14, 1974

Before STALEY, GIBBONS and WEIS, *Circuit Judges*

James J. Orlow, Esq.
1315 Walnut Street
Suite 824
Philadelphia, Pennsylvania 19107
Attorney for Petitioner

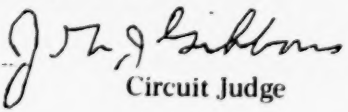
John L. Murphy, *Chief*
Government Regulations Section
Criminal Division
Robert P. Trout, *Attorney*
Department of Justice
Washington, D.C. 20530
DeWitt R. Dent, *Attorney*
Department of Justice
Washington, D.C. 20530
Attorneys for Respondent

JUDGMENT ORDER

Petitioner, a permanent resident alien lawfully deportable, sought a waiver of exclusion pursuant to 8 U.S.C. §1182(c). She was eligible for that relief only if she was eligible for adjustment of status pursuant to 8 U.S.C. §1255. As a native of Ecuador, a Western Hemisphere country, she is ineligible for adjustment of status. 8 U.S.C. §1255(c). She contends that §1255(c) is an unconstitutional discrimination against Western Hemisphere natives. Since Congress has plenary power to determine immigration policy we find no unconstitutionality.

It is ORDERED, ADJUDGED and DECREED that the petition for review be and it is hereby denied. Costs taxed in favor of respondent.

By the Court,



Circuit Judge

Attest:
Thomas F. Quinn
Clerk

Dated: JUN 17 1974

United States Department of Justice

Board of Immigration Appeals

Washington, D.C. 20530

JUL 25 1973

File: A12 097 262 — Philadelphia

In re: ANNA ZAMPITELLA

(1) IN DEPORTATION PROCEEDINGS
(2) APPLICATION FOR ADVANCE PERMISSION TO ENTER AS A RETURNING RESIDENT PURSANT TO SECTION 212(c) OF THE IMMIGRATION AND NATIONALITY ACT

Appeal

On Behalf of Respondent: James J. Orlow, Esq.
824 Bankers Securities Bldg.
Philadelphia, Pennsylvania
19107

On Behalf of I&N Service: David L. Milhollan
Appellate Trial Attorney

Oral Argument: August 9, 1972

Charges:

Order: Sec. 241(a)(11), I&N Act (8 U.S.C. 1251(a)(11))
—Convicted of violation of narcotic law (cocaine)

Lodged: None

Application: (1) Termination of proceedings; in the alternative, adjustment of status under section 245 of the Immigration and Nationality Act with section 212(c) waiver of excludability
(2) Waiver of excludability pursuant to section 212(c)

A12 097 262

This case involves two appeals by a female alien, 36 years of age, a native of Ecuador, who was admitted to the United States for permanent residence on November 20, 1960. We shall consider both appeals together. Both appeals will be dismissed.

One is an appeal from an order of deportation entered by the immigration judge, finding the respondent deportable because of a narcotics conviction on October 9, 1970, denying her adjustment of status under section 245 because she is a native of the Western Hemisphere, and denying her a waiver of excludability under section 212(c), because a section 212(c) application can only be considered in connection with a return from a trip abroad or in connection with an application for adjustment of status.

The other appeal is from the District Director's denial of her application on Form I-191 for advance permission to return to an unrelinquished domicile pursuant to section 212(c) of the Act, after an intended trip to Puerto Rico. The reason given for this denial was that there was no compelling reason for the respondent to take a trip to Puerto Rico and that it would be inappropriate to grant it to her inasmuch as deportation proceedings had been commenced at which she could lose her lawful permanent resident status. A section 212(c) waiver is available only to permanent residents. The respondent moved the District Director to reopen and reconsider. The District Director granted the motion to reopen and reconsider, but denied her application again as a matter of discretion because of the "heinousness and nature of the offense" for which she had been convicted and was still on probation and because deportation proceedings were then pending.

On appeal the respondent challenges the constitutionality of the provision in section 245(c) that the section's benefits are not available to natives of the Western Hemisphere. This Board, being an administrative body, does not pass on the constitutionality of the statutes which we administer, *Matter of L-*, 4 I&N Dec. 556 (BIA 1951); *Mat-*

ter of M-, 9 I&N Dec. 132, 138 (BIA 1960). Counsel claims that the respondent's conviction is "defective on its face." However, the record contains a record of conviction certified to be a true copy by the Deputy Clerk of the United States District Court, Eastern District of Pennsylvania, which does not appear to be defective.

The respondent submitted Form I-191, an "Application for Advance Permission to Return to Unrelinquished Domicile." She is under the impression that she has to secure advance permission to return under section 212(d)(7) of the Act, which states that the exclusion provisions of section 212(a) apply to aliens who leave Puerto Rico and seek to enter the continental United States. The respondent is excludable pursuant to section 212(a)(23) because of her narcotics conviction. However, section 212(d)(7) does not apply to a resident alien who travels to Puerto Rico from the continental United States, and then returns from Puerto Rico directly to the mainland, *Savoretti* v. *Voiler*, 214 F.2d 425 (5 Cir. 1954). Denial of the application was correct; inasmuch as no permission is necessary, the application is inappropriate.

ORDER: The appeals are dismissed.

Chairman